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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAYNE CLARK, Defendant and Appellant.	G042596 (Super. Ct. No. 08HF0269) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W. Michael Hayes, Judge. Affirmed.

Law Offices of Robert K. Weinberg and Robert K. Weinberg for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., Angela M. Borzachillo and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Jayne Clark of receiving stolen property (Pen. Code, § 496, subd. (a); all further statutory references are to this code), found her not guilty of grand theft (§ 487, subd. (a)), and hung on the burglary count (§§ 459, 460, subd. (a)), which the trial court later dismissed after declaring a mistrial. After a restitution hearing, the court suspended imposition of sentence, placed defendant on probation for three years and fixed the restitution amount at $145,000.

Defendant contends the evidence is insufficient to support her receiving stolen property conviction. She also argues the restitution order should be reversed because her due process rights were violated and a probation condition was imposed, unrelated to the crime for which she was convicted. Finding no error, we affirm.

FACTS

From April to July 2007, defendant lived temporarily with Stephanie Fizzard and her fiancé. After Fizzard's father died, she placed his ashes and letters in the top shelf of an antique armoire in the guest room where defendant was staying and, other than Fizzard, only defendant knew what was in there. Fizzard bought defendant a Shariff brand handbag, identical to one that Fizzard owned, to thank her for her support and assistance with her father. Defendant later lost the bag and asked to borrow Fizzard's. She returned it and Fizzard placed it on the shelf in the guest closet along with the other designer bags she collected, which were mostly Louis Vuitton.

After a falling out, Fizzard changed the locks on her house and asked defendant not to participate in her wedding. Defendant did not attend the wedding and dyed her hair black.

Before leaving on her honeymoon, Fizzard removed the contents of the top drawer of the antique armoire where she kept her father's ashes and letters and hid them in another location in the house. Additionally, she placed a padlock on the jewelry

armoire in the guest room closet where she stored over 300 pieces of jewelry and loose gem stones.

While Fizzard was on her honeymoon someone broke into her home. Between 9 a.m. and 10 a.m. one morning, her neighbor saw a woman, with black hair and a small frame who "wasn't that old and . . . wasn't that young," walk from the house to a small black SUV parked in Fizzard's driveway. She was carrying what looked to be a small end-table and appeared nervous as she placed it into the SUV and went back inside the house. She attempted to avoid him when she drove away.

Fizzard's housesitter returned to the home around 11 a.m. after being gone for 2 hours and discovered the sliding glass door wide open despite having closed it before she left. When she went upstairs, she found boxes of change on the floor and money strewn about. In the master bathroom, her and Fizzard's belongings were spread everywhere, a glass jar was broken, and jewelry was missing. The closet door was open in the guest room and out of the "whole bunch of purses" that had been in there, only seven or eight remained with some scattered on the floor.

Police contacted Fizzard on her honeymoon and asked if she knew any woman who drove a black SUV and was about 5 feet, 2 inches tall, 130 pounds with shoulder-length black hair. Fizzard named defendant. To confirm her suspicion, Fizzard had police check the guest room for her Shariff purse, but it was missing along with her jewelry armoire. That, together with the fact the contents of the top drawer of the antique armoire in the guest room, which only defendant knew had contained her father's ashes, had been strewn about and that only her possessions and not her husband's had been destroyed, convinced her "[t]his was a very personal burglary" committed by defendant.

Outside defendant's house, a sheriff's investigator found wood shards in her trash can that appeared to have been part of a jewelry box that had been sawed apart and smashed. Fizzard identified the pieces from their lattice work as being what was left of her jewelry armoire.

An investigator returning to defendant's house later that day found her in the driveway along with her black Mercedes SUV; defendant had black hair and the SUV's back seat contained Louis Vuitton bags. Inside the house, he found more Louis Vuitton bags, a leopard print Shariff purse, and several pieces of jewelry, including a ring. He photographed the items but did not seize them. At trial, Fizzard identified various photographed items as belonging to her and taken during the burglary.

DISCUSSION

1. Substantial Evidence of Receiving Stolen Property

The crime of receiving stolen property requires proof that (1) property was obtained by theft or extortion; (2) the defendant knew the property had been obtained this way; and (3) the defendant "received, concealed or withheld" the property or aided in doing so. (*People v. Grant* (2003) 113 Cal.App.4th 579, 596.) Defendant contends the last element was not supported by substantial evidence because "the prosecution failed to present evidence that [she] possessed any of [the] stolen property." We disagree.

Defendant concedes Fizzard specifically identified as having been stolen from her home at least eight of the items found in defendant's possession. But she argues "[w]ith the exception of [four items], there was credible and convincing testimony from multiple witnesses that [defendant] legitimately possessed these items which were found in her possession." This implies defendant did not legitimately possess the remaining four items, which would support her conviction. Moreover, the contention is nothing more than a request that we reweigh the evidence, which we may not and will not do. (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) "The uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296.) Fizzard's testimony was neither physically impossible nor inherently improbable.

Defendant maintains this court must "weigh[] the evidence presented at trial and determine whether the verdict convicting [her] of receiving stolen property is reasonable." But the rule she relies on pertains to first degree murder convictions only, which this case does not involve. (See *People v. Fonville* (1973) 35 Cal.App.3d 693, 703-704 ["'In the review of first degree murder verdicts . . . the substantial evidence formulation persists, but the appellate role is more intense, more active. Appellate duty is not satisfied, in the latter case, when substantial evidence emerges on one side. Rather, the judges must look to the evidence on both sides and not limit their scrutiny to that supporting the verdict'"].)

Defendant also contends the knowledge component of receiving stolen property was not established. This element is "normally proved not by direct evidence but by an inference from circumstantial evidence. [Citation.]" (*People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1019.) "Possession of recently stolen property is so incriminating that to warrant conviction there need only be, in addition to possession, slight corroboration in the form of statements or conduct of the defendant tending to show his guilt. [Citations.]" (*People v. McFarland* (1962) 58 Cal.2d 748, 754.) In particular, "[w]here recently stolen property is found in the conscious possession of a defendant who, upon being questioned by the police, gives a false explanation regarding his possession or remains silent under circumstances indicating a consciousness of guilt, an inference of guilt is permissible and it is for the jury to determine whether or not the inference should be drawn in the light of all the evidence." (*Id*. at p. 755.)

Here, defendant acknowledges police found in her trash can wood debris that Fizzard identified as being part of her missing jewelry armoire. But she asserts that although she "theoretically had [dominion and control] over her trash can, she did not have exclusive control since the trash can was on the curb and accessible to anyone." As the Attorney General points out, however, the fact the jewelry armoire was found in her trash can broken into pieces supports the inference "that it was at one time in her

possession, dispelling her . . . assertion . . . there was no evidence that she had knowledge that any of the property was stolen." Additionally, the jewelry armoire had been padlocked, requiring defendant to break it in order to access its contents; she then destroyed the armoire and tried to hide evidence of that in the trash can. Defendant also had in her possession a ring that Fizzard had locked in the armoire. Knowledge can be inferred from such suspicious circumstances. (*In re Richard T.* (1978) 79 Cal.App.3d 382, 388.)

Substantial evidence supports defendant's conviction for receiving stolen property. Contrary to defendant's claim, the evidence also shows the value of the stolen property exceeds $400 as charged in the information. Fizzard identified a specific Louis Vuitton tote bag as hers based on a broken zipper caused by overstuffing. She testified she had purchased it used for approximately $400, and that a new one would likely cost more than $1,000. She also identified a custom-made passport holder for which she had paid about $75. Those two items alone surpassed the $400 threshold.

2. Violation of Due Process

Defendant contends she was deprived of her due process right because although the probation report indicated Fizzard was claiming about $64,000, at the restitution hearing the trial court allowed her to include previously unreported items and to testify over objection to substantial increases in the value of her missing jewelry, ultimately ordering over $145,000 in restitution. We are not persuaded.

"A trial court's determination of the amount of restitution is reversible only if the appellant demonstrates a clear abuse of discretion." [Citation.] . . . In determining the amount of restitution, all that is required is that the trial court 'use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious.' [Citations.] The order must be affirmed if there is a

factual and rational basis for the amount." (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1382.)

"[I]t is well settled that 'statements by the victims of the crimes about the value of the property stolen constitute "prima facie evidence of value for purposes of restitution." [Citations.]' [Citations.]" (*People v. Prosser* (2007) 157 Cal.App.4th 682, 690-691.) Here, Fizzard testified at length about the value of her stolen property and provided supporting documentation. This constituted prima facie evidence of her loss and shifted the burden to "defendant to demonstrate that the amount of the loss [was] other than that claimed by the victim." (*Id*. at p. 691.)

Defendant offered no affirmative evidence challenging the amount of restitution sought but merely cross-examined Fizzard on her testimony and qualifications, including how an item she had bought in 2006 could have a current "100-fold increase in value" based on her eBay research. Notwithstanding the attacks on her testimony, the trial court found Fizzard to be "incredibly honest" without any indication "she was gauging [*sic*]." We will not set aside such credibility determinations. (*People v. Smith* (2005) 37 Cal.4th 733, 739.) For that reason, we also reject defendant's assertion that Fizzard's testimony about the loss of her purses and other items "was not only contradicted, but exceeds the limits of credulity."

Nor will we reweigh the evidence, as defendant urges us to do with her questions about the allowance and accuracy of evidence on the increase in value and the probability of Fizzard's claimed losses. To the extent defendant is asking this court to take judicial notice of how gold is valued, the request is denied. "'Reviewing courts generally do not take judicial notice of evidence not presented to the trial court' absent exceptional circumstances[] [citation]" (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 379, fn. 2), which defendant has not demonstrated. We conclude the court's order is based on substantial evidence and there is no showing that it was arbitrary or capricious.

Defendant maintains her due process right was violated because before the hearing she did not have notice Fizzard would seek in excess of $81,000 over the restitution amount set out in the probation report. But "'[t]he scope of a criminal defendant's due process rights at a hearing to determine the amount of restitution is very limited: "'A defendant's due process rights are protected when [she has] notice of the amount of restitution claimed . . . and . . . has an opportunity to challenge the figures . . . at the sentencing hearing.'" [Citations.]' [Citations.]" (*People v. Prosser*, *supra*, 157 Cal.App.4th at p. 692.) Generally, a "trial court violates the defendant's due process right at a hearing to determine the amount of restitution [only when] the hearing procedures are fundamentally unfair. [Citation.]" (*People v. Cain* (2000) 82 Cal.App.4th 81, 87.)

Defendant may not have known the actual amount Fizzard would be requesting before the restitution hearing, but she knew at the hearing and it was incumbent upon her to request a continuance in order to retain an expert, obtain documentation, or do whatever she thought was necessary to rebut the claim. (*People v. Prosser*, *supra*, 157 Cal.App.4th at p. 685.) She did not. To the contrary, although during defense counsel's cross-examination the court asked if it was a good time to take a break, it indicated it was willing to continue the hearing and was "not rushing anybody." Defense counsel responded that he had only approximately 10 minutes of cross-examination left and after questioning her further, excused Fizzard as a witness when he did not have any more questions for her. The court then continued the hearing until 11 days later. At that time, it stated its "memory is that we did not conclude the evidentiary portion of the hearing," but defense counsel offered no further testimony and instead agreed there was no reason for the court not to move on to final argument. Defendant failed to demonstrate she was deprived of due process.

3. Reasonable Relation of Restitution to Receiving Stolen Property

Defendant asserts the restitution order should be reversed because requiring her to pay full restitution is a probation condition unrelated to her crime of receiving stolen property where the jury acquitted her of the underlying grand theft. The contention lacks merit.

"A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation.]" (*People v. Lent* (1975) 15 Cal.3d 481, 486.) The condition imposed here reasonably relates to both defendant's receipt of stolen property and to the goal of deterring future criminal conduct.

Section 496, subdivision (a), which criminalizes the receipt of stolen property, "is directed at those who knowingly deal with thieves and with their stolen goods after the theft has been committed[] . . . in order to provide the thieves with a . . . depository for their loot," thereby facilitating or assisting the thief. (*People v. Tatum* (1962) 209 Cal.App.2d 179, 183, abrogated by statute on another ground as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1165.) Receivers of stolen property may also hinder the victim's ability to recover stolen property as it is passed from one person to another, and "[t]he crime of receiving stolen property has, in fact, been considered as even more serious than the theft itself. [Citation.]" (*In re Plotner* (1971) 5 Cal.3d 714, 726.) Defendant's receipt of stolen property was thus related to the theft of the property taken during the burglary even if not all of the stolen property was found in her possession.

Additionally, the restitution order deters future criminality by impressing on defendant that one of the consequences of her receipt of stolen property will be her

liability for the full costs of the victim's losses. (*People v. Lent*, *supra*, 15 Cal.3d at p. 486 ["an order of restitution, i.e., attempting to make a victim whole, has generally been deemed a deterrent to future criminality"].) "'"[T]here is no requirement the restitution order be limited to the exact amount of the loss in which the defendant is actually found culpable . . ." [citation]'" (*In re Brittany L.* (2002) 99 Cal.App.4th 1381, 1391, fn. omitted), and "restitution has been found proper where the loss was caused by related conduct not resulting in a conviction [citation], by conduct underlying dismissed and uncharged counts [citation], and by conduct resulting in an acquittal [citation]" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121).

Defendant's dependence on *People v. Scroggins* (1987) 191 Cal.App.3d 502, 506 and *In re Maxwell C.* (1984) 159 Cal.App.3d 263, 266 is misplaced. Both relied on *People v. Richards* (1976) 17 Cal.3d 614, whose reasoning was disapproved in *People v. Carbajal*, *supra*, 10 Cal.4th at p. 1126: "[I]nsofar as *Richards* may be read to require that trial courts refrain from conditioning probation on restitution 'unless the act for which the defendant is ordered to make restitution was committed with the same state of mind as the offense of which he was convicted . . .' [citation], we disapprove it."

The trial court did not abuse its discretion in holding defendant liable for Fizzard's entire loss.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

O'LEARY, J.